In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1855

ALPHONSE SISCA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-6852

LAVERN McBRIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

All petitioners contend that the district court erred in holding that they knowingly and intentionally waived their right to challenge the admissiblity of wiretap evidence on the ground that the interceptions were not properly minimized; petitioner Abraham contends that the statute prohibiting continuing criminal enterprises, 21 U.S.C. 848, is unconstitutionally vague; and petitioners Sisca and McBride contend that the evidence was insufficient to sustain their convictions.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to distribute narcotics, in violation of 21 U.S.C. 846 (Count I); all but Sisca and Hoke were convicted of unlawful use of the telephone in furtherance of the conspiracy, in violation of 21 U.S.C. 843(b) (Count III); and Abraham was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count II). Petitioners were sentenced as follows: Sisca-15 years' imprisonment (Count I), followed by 5 years' special parole; Abraham-life imprisonment (Count II) to run concurrently with consecutive 14 and 4 year terms of imprisonment (Counts I and III), to be followed by 6 years' special parole; Grant-consecutive 15 and 4 year terms of imprisonment (Counts I and III), to be followed by 5 years' special parole; Logan-concurrent 5 and 3 year terms of imprisonment (Counts I and III), subject to early parole provisions of 18 U.S.C. 4208(a)(2), to be followed by 3 years' special parole; Hoke-15 years' imprisonment (Count I), to be followed by 3 years' special parole; Holder-consecutive 15 and 4 year terms of imprisonment (Counts I and III), to be followed by 5 years' special parole; and McBride-concurrent 5 and 4 year terms of imprisonment (Counts I and III), subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by 3 years' special parole. The court of appeals affirmed in a lengthy opinion (Pet. App. A 1a-26a).[1]

The evidence is set forth fully in the opinion of the court of appeals (Pet. App. A 4a-10a). The evidence, viewed in a light most favorable to the government, established that petitioners and others were wholesale and retail

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[1]"Pet. App." refers to the separately bound Joint Appendix filed with the Sisca petition, No. 73-1855.

dealers on a large scale, operating a vertically integrated heroin and cocaine distribution network embracing New York City and New Jersey. Sisca and another were the top links between unknown drug sources and this $5,000,000 a year distribution enterprise, which handled 200 kilograms of narcotics annually. Its day to day operations were directed by Abraham, who controlled the wholesale distribution activities of Hoke, Logan, Grant and Holder. Holder was also the proprietor of a heroin cutting and packaging mill in which he employed five "mill girls", who adulterated and repackaged the heroin for delivery to bulk purchasers, one of whom was McBride.

1. Petitioners' contention that the district court erred in holding that they knowingly and intentionally waived their right to challenge the admissibility of wiretap evidence on the ground that the minimization requirements were not complied with was rejected by the court of appeals, upon whose opinion we rely. The relevant statute, 18 U.S.C. 2518(10)(a), unequivocally states that suppression motions "shall be made before the trial * * *." It is undisputed that no pretrial motion on the ground of failure to minimize was made here, and the court found no extenuating circumstances justifying failure to make a pretrial motion. Petitioners' counsel were aware, well in advance of trial, that there was a factual basis for a minimization claim (Pet. App. A 20a-21a). The district court directed before trial that any suppression motion be filed "forthwith." None was filed.[2]

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[2]Petitioners contend (Sisca Pet. 23) that a statement made by the district court shows that they were misled by it. The court stated (Sisca Pet. 22-23):

> Well, the point, it seems to me, is quite clear. In the first place, as far as the trial itself is concerned, once you know what the government is putting in or intends to put in by way

Withholding the suppression motion until trial may jeopardize the government's right to appeal an error of law, interfere with an orderly presentation of evidence to the jury, and disrupt the administration of the criminal justice system. Therefore, the court of appeals stated (Pet. App. A 24a-26a):[3]

> It is well settled that unjustified failure to make a timely motion to suppress evidence pursuant to former Fed. R. Crim. P. 41(e) (now Rules 41(f) and 12), the provisions of which are analogous to Section 2518(10)(a), constitutes a waiver of that right. *United States* v. *Ellis*, 461 F. 2d 962, 969 (2 Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Blackwood*, 456 F. 2d 526, 529 (2 Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Bennett*,

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> of affirmative evidence, you will certainly be at liberty to raise, as you develop your own investigations, any questions as to the admissibility of anything during the course of the trial. There is no question about that.

Petitioners argue that the court in this statement gave them permission to raise questions about admissibility of evidence during trial. However, the statement about raising admissibility questions during trial clearly refers to questions relating to the admissibility of evidence unknown to petitioners at that time. The court stated that objections to that evidence could be made "once you know what the government is putting in or intends to put in by way of affirmative evidence." However, the court directed that claims presently known to petitioners should be raised "forthwith."

[3]In light of its ruling on waiver, the court of appeals found it unnecessary to reach the merits of the minimization question or the question of what remedy is appropriate for a failure to minimize (Pet. App. A 19a). Although we also do not discuss these issues, we do not concede that the district court was correct in its finding that there was in this case a failure to comply with minimization requirements. See *United States* v. *Manfredi*, 488 F. 2d 588 (C.A. 2), certiorari denied, June 3, 1974, No. 73-1215.

supra, 409 F. 2d at 901; *United States* v. *Weldon*, 384 F. 2d 772, 775 (2 Cir. 1967). This is so even when even when the district court, as here, considers the merits of the suppression motion as well as its timeliness. *United States* v. *Nicholas*, 319 F. 2d 697 (2 Cir.), *cert. denied*, 375 U.S. 933 (1963); *United States* v. *Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U.S. 962 (1958). This rationale controls here.

Finally, we reject, as did the district court, appellants' contention that the finding of waiver here is inconsistent with the view that courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). We hold that appellants, by ignoring the district court's explicit directive to make their minimization motions before trial, elected to pursue a trial strategy of intentional relinquishment of a known right and the deliberate by-pass of the orderly and timely suppression procedure provided by Section 2518(10)(a). In doing so, they waived their right thereafter to challenge the admissibility of the wiretap evidence. Cf. *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1970); *Henry* v. *Mississippi*, 379 U.S. 443, 450-51 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963).

2. Petitioner Abraham contends that the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague. This contention was rejected below, as it has been rejected in *United States* v. *Manfredi*, 488 F. 2d 588, 602-603 (C.A. 2), certiorari denied, June 3, 1974, No. 73-1364, and *United States* v. *Collier*, 493 F. 2d 327 (C.A. 6), petition for a writ of certiorari pending, No. 73-

1707.[4] The conduct reached by Section 848 is only that which is already made unlawful by some other statute, and which the accused in addition organizes and supervises. Prerequisite to conviction under Section 848 is the commission of a series of felonies, each involving specific intent. Although some borderline cases may be imagined in which it is difficult to ascertain whether an accused has perpetrated a sufficiently numerous series of violations, that issue is not raised in this case. "It is beyond dispute that Abraham was the operational kingpin of a highly organized, structured and on-going narcotics distribution network" (Pet. App. A 17a). He accordingly cannot succeed in his facial attack upon the statute. See *Parker* v. *Levy*, No. 73-206, decided June 19, 1974. Cf. *United States* v. *Petrillo*, 332 U.S. 1, 7.

3. Petitioners Sisca and McBride contend that the evidence was not sufficient to sustain their convictions. These contentions were rejected in the opinion of the court of appeals.[5] The court stated (Pet. App. A 14a-15a, 10a-11a):

> [a] Sisca
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> The government adduced evidence that Sisca and Castalozzo were the top echelon links between unknown sources of supply and the narcotics distribution enterprise here involved. The principal evidence of Sisca's participation in the conspiracy were eight intercepted telephone conversations with Abraham, Castalozzo and Logan, and his presence at, and

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[4]The petition claims only that Section 848 is unconstitutional on its face (Sisca Pet. 36-41). The extensive quotation from the legislative history (Pet. App. E-1 70a-78a, referred to at Sisca Pet. 38) expresses merely the minority views of four out of thirty-eight members of the House Committee on Interstate and Foreign Commerce.

[5]Sisca's contentions and offers of proof with respect to electronic and visual identification inadequacies (Pet. 43-51) were properly addressed to the jury which rejected them.

flight from, a furtive, night-time meeting with Abraham on December 13.[9]

[9]We reject Sisca's contention that because he was acquitted on the count charging illegal use of the telephone, we may not properly consider the substance of intercepted telephone conversations in weighing the sufficiency of the evidence against him on the conspiracy count. Cf. *United States* v. *Carbone*, 378 F. 2d 420 (2 Cir.), *cert. denied*, 389 U.S. 914 (1967).

During one of these conversations—the last intercepted before the aborted December 13 meeting between Sisca, Castalozzo and Abraham—Sisca was overheard telling Abraham that the "balance" of the "thing" was available for delivery. While such talk in other context would hardly be incriminating on its face, what we have said above regarding the sufficiency of the evidence against Ellington applies with equal force here. The repeated use of such cryptic phrases in conversations with other members of the conspiracy, [footnote omitted] many of whom were apprehended in possession of narcotics, was sufficient to permit the jury to find that Sisca was an active participant in the conspiracy. *United States* v. *Manfredi, supra.*

Moreover, it is highly significant that this last intercepted call and the aborted meeting which followed pursuant to the call took place within a day of the Hoke distribution when Abraham received a large quantity of heroin. In this context, the jury was warranted in finding that the "balance" of the "thing" were the eight kilograms of heroin which

were seized on the morning of December 15. This is buttressed by Sisca's flight in response to Castalozzo's warning, "This car is dirty." If this remark meant, as might reasonably have been inferred, that the "balance" referred to narcotics being at the scene, then the jury was entitled to view Sisca's precipitous flight as evidence of consciousness of guilt. *United States* v. *Christophe*, 470 F. 2d 865, 869-70 (2 Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

[b] McBride

A search of McBride's apartment on the evening of December 15 uncovered a complete narcotics cutting mill. Her participation in the conspiracy was clearly established in an intercepted call shortly after November 24 when she identified the "Fox" (Holder) as her narcotics supplier and stated, "If Fox is out—everybody's out."[7]

[7]We reject out of hand McBride's contention that there was insufficient non-hearsay evidence to warrant the admission against her of co-conspirator's statements identifying Holder as the "Fox". [See Court of Appeals Appendix, p. 286, 291, and 299, where Holder is identified as "Fox" in intercepted conversations.] Her own intercepted admission that she was out of heroin, coupled with her arrest in constructive possession of heroin, clearly supported the court's preliminary determination of her participation in the conspiracy. *United States* v. *Geaney*, 417 F. 2d 1116, 1119 (2 Cir.), *cert. denied*, 397 U.S. 1028 (1969).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solictor General.

OCTOBER 1974.